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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 DAIMLER AG, a German corporation,
12 Plaintiff,
13 v.
14 A-Z WHEELS LLC d/b/a USARim.COM,
15 et al.,
16 Defendants.

Case No.: 16-CV-875 JLS (MDD)

**ORDER DENYING WITHOUT
PREJUDICE PLAINTIFF
DAIMLER AG'S MOTION FOR
DEFAULT JUDGMENT AGAINST
DEFENDANTS JOSHUA AND
RYAN MOALEMI**

(ECF No. 109)

18
19 Presently before the Court is Plaintiff Daimler AG's Motion for Default Judgment
20 and/or Motion for an Order to Show Cause Against Defendants Joshua Moalemi and Ryan
21 Moalemi ("Mot.," ECF No. 109), as well as Defendants USARim and Russ, Ryan, and
22 Josh Moalemi's Response to ("Opp'n," ECF No. 113) and Plaintiff's Reply in Support of
23 ("Reply," ECF No. 114) the Motion. Because the Court determines that this matter is
24 appropriate for determination on the papers and without oral argument, the Court
25 **VACATES** the hearing scheduled for July 18, 2019, pursuant to Civil Local Rule 7.1(d)(1).

26 "[P]ursuant to Civil Local Rule 16.1(f)(8), and Rules 16(f) and 37(b)(2)(A) of the
27 Federal Rules of Civil Procedure," Plaintiff requests that the Court enters "an order
28 defaulting Defendants Joshua Moalemi and Ryan Moalemi (collectively the 'Moalemi

1 Defendants’) for failing to comply with this Court’s orders, or alternatively, for an order to
2 show cause why such sanctions should not be imposed.” Not. of Mot. at 2. Specifically,

3 This motion is made on the grounds that the Moalemi Defendants
4 failed to comply with the Court’s Order of March 27, 2018 (ECF
5 No. 75)[,] which required the Moalemi Defendants to provide the
6 Court with their contact information, and the Court’s Order of
7 April 11, 2019 (ECF No. 107), which set a Pretrial Conference
8 date of June 18, 2019[,], and therefore established a deadline of
9 May 22, 2019[,], for the parties to file a Memorandum of
Contentions of Law and Fact under Civil Local Rule 16.1(f)(2)
and participate in a pre-trial meeting under Civil Local Rule
16.1(f)(4)(a).

10 *Id.* at 2–3. Plaintiff contends that default is merited based on the Moalemi Defendants’
11 “utter and complete failure to comply with the Court’s orders and the Rules of this Court.”
12 *Id.* at 3.

13 In their Opposition, Defendants note that Stephen M. Lobbin “now again represents
14 the[Moalemi Defendants], so they may be served through counsel going forward” and that
15 “the Main Defendants—USARim and Russ Moalemi—did participate[in pretrial matters],
16 and that participation should inure to the credit of Ryan and Josh because their trial
17 contentions align completely with those of the main Defendants.” Opp’n at 2.

18 Plaintiff rejoins that “[t]he Opposition fails entirely to address substantively the
19 willful actions of Joshua and Ryan Moalemi,” Reply at 2, and contends that “the record
20 belies that” all Defendants are aligned in their defense of this case to be presented at trial.
21 *Id.* at 4. Plaintiff further argues that Mr. Lobbin’s agreeing to represent the Moalemi
22 Defendants “only for the limited purposes of pre-trial, trial, and settlement proceedings,”
23 *see* Opp’n at 1 n.1, is “deficient under this Court’s Local Rule 83.3(f),” *see* Reply at 5, and
24 prejudicial. *Id.* at 5–6.

25 The Court understands Plaintiff’s frustration. This case was filed on April 11,
26 2016—well over three years ago. *See generally* ECF No. 1. The Ninth Circuit has
27 cautioned, however, that “[d]ismissal is a harsh penalty and is to be imposed only in
28 extreme circumstances.” *Henderson v. Duncan*, 779 F.2d 1421, 1423 (9th Cir. 1986).

1 There are five factors a district court must “consider before resorting to the penalty of
2 dismissal: ‘(1) the public’s interest in expeditious resolution of litigation; (2) the court’s
3 need to manage its docket; (3) the risk of prejudice to the defendants; (4) the public policy
4 favoring disposition of cases on their merits; and (5) the availability of less drastic
5 sanctions.’” *Hernandez v. City of El Monte*, 138 F.3d 393, 399 (9th Cir. 1998) (quoting
6 *Henderson*, 779 F.2d at 1423). Dismissal may be appropriate where four of the factors
7 weigh in favor of dismissal or “at least three factors ‘strongly’ support dismissal.” *Id.*

8 First, as noted, this case is over three years old. Only part of this delay, however,
9 can be attributed to the actions of the Moalemi Defendants that are the subject of Plaintiff’s
10 Motion. Nonetheless, this delay does run counter to the public’s interest in expeditious
11 litigation. Consequently, the first factor favors dismissal. *See id.*

12 Second, this delay has somewhat impaired the Court’s ability to manage its docket,
13 as the Court has been forced to vacate the final pretrial conference, *see* ECF No. 103, and
14 other pretrial dates. *See* ECF No. 111. But the Moalemi Defendants’ actions “did not
15 consume ‘large amounts of the court’s valuable time,’ . . . or cause any ‘serious disruptions’
16 of the district court’s schedule,” meaning “the second factor ‘weigh[s] in favor of the
17 sanction, but not heavily.’” *Hernandez*, 138 F.3d at 399 (citations omitted).

18 Third, Plaintiff “ha[s] not shown how the [Moalemi Defendants’ actions] might
19 ‘impair [Plaintiff’s] ability to go to trial or threaten to interfere with the rightful decision
20 of the case.’” *Id.* (quoting *Malone v. U.S. Postal Serv.*, 833 F.2d 128, 131 (9th Cir. 1987)).
21 “Therefore, [Plaintiff] ha[s] not shown the type of prejudice that [is required] under the
22 third factor.” *Id.* (citing *Malone*, 833 F.2d at 131).

23 “Fourth, the public policy favoring disposition of cases on their merits counsels
24 strongly against dismissal.” *Id.*

25 Fifth and finally, the Court ultimately concludes that “the availability of less drastic
26 alternatives also counsels strongly against dismissal.” *See id.* Plaintiff contends that
27 “[s]anctions short of default have been imposed previously by the Court for similar
28 delinquent behavior by the Moalemi Defendants . . . and such sanctions did not motivate

1 the Moalemi Defendants.” *See* Mot. at 19. The sanctions order on which Plaintiff relies,
2 however, was entered by Magistrate Judge Mitchell D. Dembin on April 23, 2018, *see*
3 *generally* ECF No. 84, after Mr. Lobbin was granted leave to withdraw as counsel for the
4 Moalemi Defendants on March 27, 2018. *See generally* ECF No. 75.

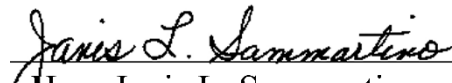
5 With Mr. Lobbin once again agreeing to represent the Moalemi Defendants, it is the
6 Court’s sincere hope that this action can move toward expeditious resolution.¹ At this time,
7 the Court therefore **DENIES WITHOUT PREJUDICE** Plaintiff’s Motion (ECF No.
8 109). *See, e.g., Hernandez*, 138 F.3d at 399 (reversing district court’s dismissal of action
9 where only two of the five *Henderson* factors could be said to support dismissal).
10 Defendants, however, will be kept on a short leash. The Parties **SHALL CONTACT**
11 Judge Dembin within three (3) days of the electronic docketing of this Order to schedule a
12 Mandatory Settlement Conference and so that Judge Dembin may issue a Scheduling
13 Order. Further, Defendants—and the Moalemi Defendants in particular—are
14 **CAUTIONED** that

15 Failure of . . . any party to comply with the[District’s Local
16 R]ules, with the Federal Rules of Civil . . . Procedure, or with
17 any order of the court may be grounds for imposition by the court
18 of any and all sanctions authorized by statute or rule or within
19 the inherent power of the court, including, without limitation, . . .
entry of default, finding of contempt, imposition of monetary
sanctions or attorneys’ fees and costs, and other lesser sanctions.

20 *See* S.D. Cal. CivLR 83.1(a).

21 **IT IS SO ORDERED.**

22
23 Dated: July 10, 2019

24 
25 Hon. Janis L. Sammartino
26 United States District Judge

27 ¹ Although the Court is troubled by Plaintiff’s argument that the interests of Defendants do not align, *see*
28 Reply at 4–5, a motion for default judgment is not the proper vehicle for the Court to address any potential
conflicts of interest.